STATE OF MICHIGAN

MACOMB COUNTY CIRCUIT COURT

MARIE LOUISE LISABETH,

Plaintiff,

Case No. 2005-2092-CK

vs.

AUTO OWNERS INSURANCE COMPANY,

Defendant.

/

OPINION AND ORDER

Defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(10).

According to plaintiff's complaint, she was a passenger in a motor vehicle during a collision which occurred on September 27, 2003. At the time of the collision, plaintiff was 73 years old. Plaintiff had an underinsured insurance policy with defendant company with a $500,000 limit, at the time of the accident. Plaintiff settled with the at-fault driver for his policy limits which was approved by defendant insurance company. Plaintiff filed suit in the instant case alleging that defendant insurance company refuses to pay the policy limits of her underinsured coverage in spite of the fact that she has complied with all conditions precedent for coverage. Defendant insurance company now moves for dismissal of the case on the basis that plaintiff cannot establish a threshold injury for recovery under MCL 500.3135 *et seq.*

Standard of Review

A motion for summary disposition under MCR 2.116(C)(10) challenges the factual sufficiency of the complaint. *Corley v Board of Ed,* 470 Mich 274, 278; 681 NW2d 342 (2004). The record is considered in a light most favorable to the nonmoving party to determine whether a genuine issue of material fact exists that precludes granting judgment as a matter of law to the

moving party. *Laier v Kitchen,* 266 Mich App 482, 486-487; 702 NW2d 199 (2005). Once the moving party has met the initial burden by supporting its position with documentary evidence, the burden shifts to the nonmoving party to establish the existence of a genuine issue of fact. *Pena v Ingham Co Rd Comm,* 255 Mich App 299, 310; 660 NW2d 351 (2003). A genuine issue of fact exists when the record leaves open an issue on which reasonable minds could differ. *West v Gen Motors Corp,* 469 Mich 177, 183; 665 NW2d 468 (2003).

Applicable Law

Under MCL 500.3135(1), a person is subject to tort liability for noneconomic loss caused by his or her "use of a motor vehicle only if the injured person has suffered death, serious impairment of body function, or permanent serious disfigurement." *Moore v Cregeur,* 266 Mich App 515, 517; 702 NW2d 648 (2005). As used in this section, serious impairment of body function" is defined as "an objectively manifested impairment of an important body function that affects the person's general ability to lead his or her normal life." MCL 500.3135(7); *Id.*

Our Supreme Court has provided a framework to use for determining whether a plaintiff meets the serious impairment threshold. *Kreiner v Fischer,* 471 Mich 109, 131-134; 683 NW2d 611 (2004). First, a court is to determine whether a factual dispute exists "concerning the nature and extent of the person's injuries; or if there is a factual dispute, that it is not material to the determination whether the person has suffered a serious impairment of body function." *Id* at 131-132.

If there are material factual disputes, a court may not decide the issue as a matter of law. *Moore, supra* at 518. If no material question of fact exists regarding the nature and extent of the plaintiff's injuries, whether plaintiff's injuries constitute a serious impairment of body function is a matter of law. MCL 500.3135(2)(a); *Kreiner, supra* at 132.

When the court decides that the issue is a matter of law, it must then go to the second step in the analysis and determine whether "an important body function of the plaintiff has been impaired." *Kreiner, supra.* When a court finds an objectively manifested impairment if an important body function, "it then must determine if the impairment affects the plaintiff's general ability to lead his or her normal life." *Id.* This involves an examination of the plaintiff's life before and after the accident. *Moore, supra* at 518. The court should objectively determine whether any change in his or her lifestyle "has actually affected the plaintiff's 'general ability' to conduct the course of his life." *Kreiner, supra* at 132-133.

Furthermore, an impairment of short duration may constitute a serious impairment of body function if its effect on the plaintiff's life is extensive. *Williams v Medukas,* 266 Mich App 505, 508; 702 NW2d 667 (2005), relying on *Kreiner,* at 134.

The *Kreiner* Court provided a non-exhaustive list of objective factors that may be used in making this determination. These factors include "(a) the nature and extent of the impairment, (b) the type and length of treatment required, (c) the duration of the impairment, (d) the extent of any residual impairment, and (e) the prognosis for eventual recovery." *Id* at 133.

In order to be objectively manifested, there must be a medically identifiable injury that has a physical basis. *Jackson v Nelson,* 252 Mich App 643, 652; 654 NW2d 604 (2002). Subjective complaints of injury can support a claim of serious impairment of body function, but only if there is a physical basis and an expert diagnosis to support the subjective claim. *Id* at 650.

The Michigan Supreme Court has held that a plaintiff may recover noneconomic damages under MCL 500.3135 if the trauma caused by the accident triggered symptoms from a preexisting condition. See *Wilkinson v Lee,* 463 Mich 388, 395; 617 NW2d 305 (2000).

However, plaintiff must nevertheless demonstrate that the aggravated injury satisfies the dictates of MCL 500.3135.

MCL 500.3135(2)(a)(ii) provides that for a closed head injury, a question of fact for the jury is created if a licensed allopathic or osteopathic physician who regularly diagnoses or treats closed head injuries testifies under oath that there may be a serious neurological injury. In *Churchman v Rickerson,* 240 Mich App 223; 611 NW2d 333 (2000), the Court stated that to give effect to the phrase "serious neurological injury," it must be concluded that the closed head injury provision of §3135 requires more than a diagnosis that a plaintiff has sustained a closed head injury. *Id* at 229. The Court went on to explain that the plain language of the statute requires that the affidavit must contain testimony that a plaintiff may have sustained a *serious* neurological injury. *Id* at 231 (emphasis in original).

Evidentiary Documentation

When plaintiff was admitted to Beaumont Hospital in Royal Oak, she was complaining of sharp pain in her chest and right arm. Radiology reports conducted on 28 September 2003, one day after plaintiff's accident, indicate that the more significant injuries she sustained were fractured right ribs, loss of integrity to the right chest wall, and liver contusion without overt intraperitoneal blood. Additionally, a fracture of the distal right radius of her right wrist was noted. Radiology examination of plaintiff's head indicated findings consistent with parenchymal brain contusion and component of subarachnoid hemorrhage. With regards to her cervical spine, the radiology reports indicated mainly degenerative changes. Plaintiff remained in the hospital until her date of discharge on October 10, 2003.

Plaintiff's discharge report indicated her admission diagnoses as multi-trauma, status post motor vehicle collision, including right scapula fracture, right distal radius fracture, and left

frontal lobe interparenchymal hemorrhage. The report also indicated plaintiff suffered fractures of the first through third ribs, fracture of the right scapula and a tiny right pneumothorax. The report also indicated the patient was as well found to have on chest x-ray, fractures of first through sixth ribs on the right. During her stay in the hospital, plaintiff was started in physical and occupational therapy, without complications, and she continued to progress well. By October 10th, plaintiff was determined to be stable for discharge home.

Plaintiff's discharge report indicated plans were made for skilled home care including physical and occupational therapy. Plaintiff continued to wear the sling to her right arm, and to be nonweight bearing to the right arm until further instructions given.

Progress Notes dated March 9, 2004 indicate that plaintiff was generally doing well given the nature of her severe motor vehicle accident. Her cardiac status is stable, and no changes were necessary, i.e., her pacemaker was checked and was working normally.

Plaintiff self-reported during a neurological evaluation on 5 October 2004 that following her stay in the hospital, she continued with therapy until she went to Florida in December, 2003. She stated she continued her therapy while in Florida, until she returned to Michigan in April, 2004. Plaintiff then continued therapy, but was ready for discharge at the time of the examination. Plaintiff underwent a battery of psychological and neurological testing; of significance, it was noted by the psychologist, "I am hesitant to relate the current language related difficulties to her accident as there appears to be a previous history of left-hemisphere lacunar infarct as well as previous history of difficulty reading. However, this may have been exacerbated by the current injury." The diagnosis was, (1) post-concussional syndrome and (2) adjustment to reaction with mixed anxiety and depressed mood.

Plaintiff underwent an IME, neuropsychological evaluation, on November 17, 2005. Among other findings, this report indicates that as of August 25, 2004, plaintiff's fractures had healed and she was instructed to continue physical therapy up to the point where she was to leave for Florida and then discontinue treatment. A review of a report for neuropsychological testing on October 5 and 6, 2004, indicated they were consistent with expectations based upon plaintiff's limited intellectual development. The summary of the November 17, 2005 examination and testing is as follows. The test profile is was largely within normal limits. The patterns of strengths and weaknesses is not consistent with the profile typically found in cases of closed head injury, although there has been some deterioration compared to the 2004 report, perhaps due to senile dementia or age-related cognitive decline. Further, the history given by plaintiff is consistent with a mild traumatic brain injury, but the current tests suggest that she has made a successful recovery from her brain injury. Additionally, it was noted that from a neuropsychological standpoint, plaintiff appears capable of functioning independently without restrictions or assistance. Plaintiff's psychological status is characterized by symptoms of depression and anxiety that appear to be related to physical changes following her accident.

With regards to deposition testimony proffered, plaintiff's primary physician, Mary Beth Hardwicke, M.D., who specializes in internal medicine, testified that she is not a neuropsychologist, neurologist, psychiatrist, psychologist, has no specialties in traumatic brain injuries or cognitive impairment injuries. Dr. Hardwicke stated that she utilized specialists in the areas of which she is unlearned to give opinions as to plaintiff's cognitive, mental and emotional impairment complaints. Dr. Hardwicke stated plaintiff has experienced several changes since the car accident that did not exist before, i.e., she now has to use a cane, she is depressed, she cannot exercise or play tennis, she's not as sharp as her brain's not working as quickly, and although she

could not remember specifically, she stated plaintiff had told her she had difficulty at home with some household activities, as well as anything associated with walking like shopping, buying clothes for herself, cooking.

Deposition testimony of Dr. Abdallah Zamaria demonstrated that he was certified by the American Board of Psychiatry and Neurology and geriatric psychiatry. Traumatic brain injuries is not a main specialty for Dr. Zamaria. Dr. Zamaria first met plaintiff in November, 2005, and saw her on only one occasion thereafter. Dr. Zamaria opined that plaintiff is more emotional and depressed, and also symptomatic of cognitive dysfunction or cognitive problems due to the accident.

Plaintiff testified that she can drive to and from the grocery store herself, can clean the house herself, i.e., dust, vacuum and mop the floors, can do the laundry although she needs her husband to carry the laundry basket up the stairs after she gets the clothes folded. As far as social activities are concerned, plaintiff plays bingo on Monday nights when in Florida; from time to time she and her husband go to restaurants and the movies. Plaintiff stated that prior to her accident she and her husband used to "go dancing and everything." Plaintiff testified that she used to play tennis, although the summer prior to her accident she did not because the women did not play together anymore in Michigan.

With regards to her injuries from the accident, plaintiff stated that she received no surgical treatment as her wrist had been cast, and "They just left the ribs" and did not treat them. Plaintiff stated she has no problems with her ribs now. Plaintiff also had no treatment for the injury to her liver injury, nor has she had any residual problems since. Plaintiff stated she had no treatment for the bleeding in her brain, as it stopped on its own and repaired itself. Other than a neck collar while in the hospital, she has not had any problems with her neck, just that once in a

while it hurts. Plaintiff stated she has been having headaches since her accident, but no one has been able to figure out why. Plaintiff stated she takes no medication for her headaches. Plaintiff states that the constant headaches keeps her from taking care of the books from her husband's rental business, and she can no longer play tennis. Overall, she feels depressed and she cries a lot, yet she admits she has not had any treatment for it. Plaintiff stated that when she was told to get treatment for depression she stated she did not have time because she was going to Florida. When she returned from Florida she just never thought about it. Plaintiff stated she cannot go for as many walks as she used to, she cannot do her banking, cannot write checks, cannot pay bills, does not cook as much, does not baby-sit as much for her grandchildren, cannot crochet.

Analysis

It is evident that plaintiff sustained objectively manifested injuries in the car accident of September, 2003, but they have all been resolved[1]. Her medical treaters state she sustained some brain contusion and hemorrhaging, but that, too, has resolved. Plaintiff has not provided an affidavit of a licensed allopathic or osteopathic physician who regularly diagnoses or treats closed head injuries, so it is assumed plaintiff has not suffered from a serious neurological injury. However, it is not clear as to whether her current lack of memory, confusion, forgetfulness, inability to do simple calculations is due to the brain contusion or the aging process. Plaintiff is currently 76 years old, borderline diabetic, obese, and on multiple medications to control her hypertension, high cholesterol and other ailments. She has a significant history of cardiac-related medical problems. She has had two pacemakers.

Based on the evidence as presented, the Court is convinced that there remains a genuine issue of fact that is material to the determination whether plaintiff has suffered a serious

[1] But, see *Williams, supra.*

impairment of body function. To this end, it is inappropriate to grant defendant's motion for summary disposition.

For the above-stated reasons, defendant Auto-Owners Insurance Company's motion for summary disposition under MCR 2.226(C)(10) is DENIED. The Court states that pursuant to MCR 2.602(A)(3), this case remains OPEN, as all issues have yet to be resolved.

IT IS SO ORDERED.

Dated: July 6, 2006

DONALD G. MILLER
Circuit Court Judge

CC: Paul G. Valentino
Mark F. Masters

DONALD G. MILLER
CIRCUIT JUDGE

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BY: _____ Court Clerk